Privilege - Psychotherapist
FRE 501
B.R. 7026

Huntley v. Snyder — Adv. No. 95-6190-fra
In re Gerald V. Snyder — Main Case No. 695-61784-fra7

1/19/96 FRA Unpublished

The Plaintiff filed a motion for an order compelling the production of psychiatric records held by two doctors relating to their treatment of the debtor. The debtor responded that the records are protected by a psychotherapist-patient privilege and are thus not subject to the Plaintiff's subpoena. Because a determination of dischargeability under § 523 (the basis of Plaintiff's adversary proceeding) is dependant on federal bankruptcy law, rather than state law, FRE 501 requires that the court look to federal common law to determine whether a privilege applies. As the Ninth Circuit does not currently recognize a psychotherapist-patient or physician-patient privilege, the court held that the records are subject to Plaintiff's subpoena. Access to the records was limited by the court under B.R. 7026, however, to only those persons who need them to prepare the case for trial.

E96-1(6)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
GERALD V. SNYDER,	)	Case No. 695-61784-fra7
	)	
Debtor.	)	
	)	
GLORIA HUNTLEY, Personal Representative of Louise Billie Williams Estate,	)	
	)	
Plaintiff,	)	
vs.	)	Adversary No. 95-6190-fra
	)	
GERALD VERNON SNYDER,	)	
	)	MEMORANDUM OPINION
Defendant.	)	

Plaintiff in this action has filed a motion for an order to compel the production of the psychiatric records of the debtor which are currently in the possession of two physicians who have been treating him. The Defendant responds that those records are protected under a psychotherapist-patient privilege. Plaintiff argues that the debtor has waived that privilege. For the reasons that follow, this court holds that the records in question are not

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protected under a physician-patient or psychotherapist-patient privilege.

FACTS

Plaintiff, as personal representative of Ms. William's estate, filed a wrongful death complaint against the debtor in Coos County Circuit Court. A default judgment in excess of $200,000 was entered by the Circuit Court. The debtor subsequently filed for bankruptcy under Chapter 7. This adversary proceeding was instituted by the Plaintiff to challenge the dischargeability of the state judgment under 11 U.S.C. § 523(a)(6). In furtherance of her case, the Plaintiff wishes to compel production of medical records relating to debtor's psychiatric treatment.

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The evidentiary rule in federal court regarding a person's right to keep privileged communication confidential is found in F.R.E. 501. That rule reads as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

In other words, if the dispute in federal court must be resolved with reference to state law, then the existence and extent of an evidentiary privilege is determined by state law. However,

in a federal civil action where the controlling law is federal law, the Court must look to federal law to determine whether a privilege exists.

The Plaintiff has asked the court in this adversary proceeding to find that the claim held by her is nondischargeable under 11 U.S.C. § 523(a)(6). Resolution of that question is a matter of federal bankruptcy law.

The Ninth Circuit Court of Appeals held in a 1989 opinion that "[t]his circuit has not recognized a psychotherapist-patient privilege in a criminal context. Neither have we adopted a physician-patient privilege." They further stated that "[t]he psychotherapist-patient privilege has developed by state statutory enactment" and does not exist at common law. In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989).

LIMITS ON DISCLOSURE

While the records are not subject to any evidentiary privilege in this Circuit, there can be no doubt that Defendant has an interest in maintaining the privacy of the records. See United States v. Diamond, 964 F.2d 1325 (2d Cir. 1992), Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995) (Both cases recognizing a federal psychotherapist-patient privilege). As the Diamond court pointed out:

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> [I]t can hardly be disputed that communications between a patient and a psychotherapist typically involve far more intensely personal information than communications to other kinds of doctors, a fact that accounts for the somewhat wider recognition of a privilege in the case of psychotherapists than in the case of physicians generally. See Developments, 98 Harv.L.Rev. at 1539. The diagnosis of a psychotherapist may also involve matters that a patient regards as highly personal. Disclosure of communications to psychotherapists and their diagnoses would frequently be embarrassing to the point of mortification for the patient. Nor can it be seriously disputed that unrestrained disclosure might discourage persons from seeking psychiatric help. 964 F.2d at 1328.

The Circuit Court in In re Grand Jury Proceedings, *supra*, did not have to wrestle with this consideration, given the non-public nature of grand jury proceedings. (The target of the grand jury's investigation is referred to in the opinion as "Jane Doe".) This is not to say that the case is readily distinguishable: The Court's reasoning that the privilege has never existed in common law, is just as applicable in this context. However, where there are no guarantees of privacy as exist in grand jury proceedings, compelled disclosure of such sensitive matters should be conditioned in a manner which strikes a reasonable balance between the patient's interests and the demanding party's right to discovery. Fed. R. Civ. P. 26(c) (made applicable to bankruptcy cases by B.R. 7026) authorizes orders limiting use or disclosure of information obtained in discovery in order to avoid embarrassment of a party or other person.

In this case, the records sought by Plaintiff -- and any copies thereof -- must be maintained and used so as to limit disclosure of the information contained therein to those who need

it in order to prepare this case for trial. Accordingly, the court will order that the records, once delivered, be maintained in a place not accessible to persons with no need to view them, and that they be revealed to or discussed with only those members of Plaintiff counsel's staff involved in the case, and any expert witness engaged by Plaintiff for the purpose of evaluation or testimony about Defendant's condition. Disclosure to Plaintiff herself is permitted to the extent reasonably necessary to allow her to make informed decisions about the conduct of the case. All persons to whom disclosure is made are to be bound by the restriction on further disclosure contained in the order. In the event records are to be filed with court, the filing party shall ensure that they are filed under seal.

DISCOVERY BAR DATE

Defendant argues that the motion should be denied in light of this Court's order closing discovery prior to the time Plaintiff moved to compel production of the records in question. The order was part of a standard scheduling order entered shortly after the answer was filed. It provided that discovery would close 70 days after entry of the order -- in this case, on November 14, 1995. The motion was filed on December 1, 1995.

Scheduling orders are designed to expedite cases, and the business of the court. Relief from the effect of such orders should not be denied where no prejudice attaches. Defendant does not argue, nor does the record reflect, that he has been prejudiced by the delay.

CONCLUSION

Because resolution of this adversary proceeding is dependent on federal bankruptcy law, the Court must look to federal law to determine whether the records sought are subject to a psychotherapist-patient privilege. As no such privilege is recognized under federal law in the Ninth Circuit, the records are not protected by privilege and are subject to the Plaintiff's subpoena deuces tecum. An order consistent with this opinion will be entered.

FRANK R. ALLEY, III
Bankruptcy Judge